Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

GEORGE WEBSTER,

Petitioner,

v.

BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court and Fifth Circuit so departed from accepted and usual course of judicial proceedings by holding that the retirement board did not abuse its discretion in adopting an interpretation of a retirement plan which directly conflicts with the goals and purpose of the plan in that even if it is undisputed that a person has a condition which by itself renders him totally disabled, he may be denied benefits for that illness or injury if he suffers for another illness or injury which by itself would render him totally disabled, even though the denied benefits are substantially higher than benefits for the initial disability.

2. Whether the trial court and Fifth Circuit so departed from accepted and usual course of judicial proceedings by finding a person's disability benefits may not be reclassified such that the person may receive higher benefits for a subsequent illness or injury rising to the level of a total disability as long as the effects of the first totally disabling illness or injury are present, even if the effects no longer alone rise to the level of a total disability.

LIST OF ALL PARTIES

PETITIONER:

GEORGE WEBSTER

RESPONDENTS:

BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN; WILLIAM BIDWILL; THOMAS CONDON; GENE UPSHAW; TAYLOR SMITH; LEONARD TEEUWS; JEFF VAN NOTE; EDDIE JONES; JAMES KENSIL; DANIEL JIGGETTS; EDWARD GARVRY; SARAH E. GAUNT, formerly known as Sarah E. Meizlik.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, George Webster, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions and decisions of the Fifth Circuit Court of Appeals are unreported. These opinions and decisions are comprised of the Fifth Circuit's opinion on appeal and the denial of Petitioner's Motion for Rehearing. These and the decision of the District Court granting summary judgment against Petitioner are attached and printed as Appendices.

JURISDICTION

The Fifth Circuit Court of Appeals entered judgment on September 22, 1997. The Fifth Circuit denied Petitioner's Motion for Rehearing on October 23, 1997. Petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1254(1).

Jurisdiction is also proper pursuant to United States Supreme Court Rule 10 because the Fifth Circuit, "has decided an important question of federal law that has not been, but should be, settled by this Court."

STATUTORY PROVISIONS INVOLVED

1. Federal Rule of Civil Procedure 56

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in Court below

On June 7, 1995, Webster filed suit in the 165th Judicial District of Harris County, Texas, claiming arbitrary and capricious denial of past and future retirement/disability benefits, breach of fiduciary duties, intentional infliction of emotional distress and breach of contract. (R. at 100-94). On July 24, 1995, defendants filed a notice of removal asserting jurisdiction under 28 U.S.C. §§ 1441 and 1446. (R. at 109). On October 4, 1995, defendants filed a motion to dismiss the second, third and fourth counts of Plaintiff's Original Petition, and to strike plaintiff's demand for punitive damages. (R. at 156). On October 25, 1995, Webster filed his reply to defendants' motion to dismiss and to strike. (R. at 184-173). On October 31, 1995, the defendants filed a motion for summary judgment on Webster's first count in his original petition. (R. at 229-185). Webster filed a response to defendants' motion, including a counter motion for summary judgment. (R. at 273-233).

On June 12, 1996, the district court granted defendants' motion to dismiss and motion to strike, granted defendants' motion for summary judgment, and denied Webster's counter motion for summary judgment. (R. at 380-358). While the court noted that Webster fell under

the provisions of the 1986 retirement plan, if found the retirement board's interpretation was legally correct and not an abuse of discretion. (R. at 380-358). Webster filed a motion to alter or amend the judgment on June 24, 1996. (R. at 384-381). The district court denied Webster's motion, and entered final judgment on October 30, 1996. (R. at 401-397). Webster timely filed his notice of appeal on November 20, 1996. (R. at 403-02).

(ii) Statement of Facts

Webster's NFL Career

In 1967 George Webster was the Houston Oilers' number one draft pick out of Michigan State. He entered the National Football League full of hope and promise. In 1967 Webster was Rookie of the Year, and an All Pro selection his first four years.

In 1968 Webster had his first knee surgery, which was one of many surgeries. Almost every game Webster suffered some sort of injury including dislocated shoulders, back injuries, broken bones, torn and cut ligaments and tendons, and bruises, too many to detail. In 1972 the Oilers traded him to Pittsburgh who traded him to New England the same year. In 1976, after having passed New England's physical to play that year, Webster was traded to Miami where he failed Miami's physical. Webster's career in the NFL ended in 1976 because he was physically unable to play.

Webster's First Application For Disability

On February 23, 1989 George Webster applied for total and permanent disability benefits under the Bert Bell NFL Player Retirement Plan ("Plan"). Doc. 75. When a player requests an application for benefits, the retirement board instructs the player to see a specific doctor selected by the retirement board. Webster was examined by Dr. James Butler, a physician selected by the defendants. Dr. Butler determined Webster had 80% or more loss of the use of his hand, foot, ankle and knee as a result of football-related activity. Doc. 73. The nature of Webster's disability was his arthritic knees, right foot and ankle, right hand, lower back and both shoulders. Doc. 73. Dr. Butler determined Webster would never be able to play football again. Doc. 73. Even though the physicians' report discussed the nature of Webster's disability, Webster was denied benefits because the physician answered "no" when asked if Webster was totally disabled under the NFL's definition. Doc. 73, 78. Article 5.2 of the retirement plan states that a player is "deemed to be totally and permanently disabled if the Retirement Board shall find that he has become totally disabled to the extent that he is prevented from or unable to engage in any occupation or employment for remuneration or profit. . . . " Exhibit 7 at 27. Webster's appeal was also denied for the same reason. Doc. 78.

Webster's Bout With Throat Cancer

Webster subsequently developed throat cancer, and again applied for disability benefits from the plan. Doc. 109. On April 10, 1991, the retirement board instructed

Webster to visit his attending oncologist, and have him fill out the standard NFL physician's report. Doc. 107. Dr. Cotlar examined Webster on April 18, 1991. Dr. Cotlar marked "yes" under the question of whether Webster was totally disabled. Doc. 108. Dr. Cotlar marked "no" when asked if this illness or injury was the result of a football related injury. Doc. 108. At the June 13, 1991 meeting, the retirement board approved Webster's non-football disability. Doc. 119.

Webster's Total Disability Now Results Exclusively From Football Injuries

On April 6, 1992 the retirement board instructed Webster again to be examined by Dr. Cotlar for a periodic examination under the plan. Doc. 126. In his report of May 14, 1992, Dr. Cotlar stated that Webster was 80% or more disabled in his neck, back, shoulder, knee and hand, and that Webster was totally disabled due to football-related activity. Doc. 128. Dr. Cotlar discussed Webster's cancer, but, unlike his previous report, only checked the "yes" answer when asked if the disability resulted from a football related activity. Doc. 128, 108. Dr. Cotlar did not indicate Webster was totally disabled due to cancer by checking "no." Doc. 128, 108.

On April 8, 1993, the retirement board again instructed Webster to visit Dr. Cotlar for another periodic exam. Doc. 134. The results were nearly identical, with Dr. Cotlar again finding total disability only from football injuries. Doc. 135. Once again Dr. Cotlar, unlike in his physician's report of 1991, only answered "yes" when

asked if the total disability resulted from a football related activity. Doc. 135, 108.

In 1993 Webster called the retirement board asking for a Total and Permanent Football-Related Disability Application. Doc. 139. On August 31, 1993, the retirement board wrote Webster and informed him that as he was already receiving non-football benefits, he could request to be reclassified as football disability. Doc. 139. On October 8, 1993, Webster did just as the retirement board had instructed, and requested the retirement board to reclassify his disability as football-related. Doc. 140. At the January 6, 1994 meeting, the retirement board denied Webster's application for reclassification, stating only that "you did not meet the requirements of Article 5, Section 1 of the Plan. '5.1 . . . the disability results from a football injury incurred while an Active Player . . . ' " Doc. 147; Exhibit 7 at 27. On April 8, Webster informed the retirement board he intended to appeal their denial of his request for reclassification. Doc. 149. On April 19, 1994, the retirement board again asked Webster to be examined. Doc. 150. Webster was examined by Dr. Jones. Doc. 151. On May 28, 1994, Dr. Jones concurred with Dr. Cotlar, finding Webster to be totally and permanently disabled due to football related illness or injury. Doc. 151. Once again, unlike the physicians report finding non-football total disability, only the "yes" box was checked when asked if the disability was the result of football related activity. Doc. 151, 108.

The retirement board denied Webster's appeal of this decision on October 20, 1994, this time citing Section 5.1(c) of the 1993 Plan. Doc. 161. The retirement board stated "from the medical evidence submitted to the

Plan, . . . Mr. Webster's disablements resulted in total and permanent disability effective October 1, 1990, when his throat cancer had been diagnosed. None of the medical or other evidence submitted to the Retirement Board indicated that Webster's disability was total and permanent under the terms of the Plan before his cancer diagnosis." Doc. 161. The board then concluded that his "total and permanent disability is not the result of disability(ies) that arose out of League football activities." Doc. 161. Unable to have the board award him the benefits to which he was entitled, Webster filed this suit in 1995. (R. at 100-94).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit allowed the retirement board to deny a higher level of benefits for a disability, the presence of which was not questioned, because the plaintiff was already receiving a lesser amount of benefits for a different and independent illness which according to physician's reports, previously, but no longer, reached the level of a total disability. Additionally, the Fifth Circuit allowed the board to deny benefits by adopting an interpretation which directly conflicted with the goals of the retirement plan.

The Fifth Circuit reviewed *de novo* the district court's holding on the question of whether the retirement board abused its discretion. *Bellaire Gen. Hospital v. Blue Cross Blue Shield*, 97 F.3d 822, 829 (5th Cir. 1996); *Sweatman v. Commercial Union Ins. Co.*, 39 F.3d 594, 601 (5th Cir. 1994). When reviewing an interpretation of a retirement plan

under the abuse of discretion standard, a reviewing court must first determine the legally correct interpretation of the plan. If the administrator did not give the plan the legally correct interpretation, the court must then determine whether the administrator's decision was an abuse of discretion. *James v. La. Laborers Health & Welfare*, 29 F.3d 1029, 1032-33 (5th Cir. 1994); *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1519 (5th Cir. 1994); *Haubold v. Intermedics, Inc.*, 11 F.3d 1333, 1337 (5th Cir. 1994); *Jones v. Sonat, Inc.*, 997 F.2d 113, 115-16 (5th Cir. 1993); *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 637 (5th Cir. 1992); *Kennedy v. Electricians Pension Plan, IBEW No. 995*, 954 F.2d 1116, 1121 (5th Cir. 1992); *Jordan v. Cameron Iron Works, Inc.*, 900 F.2d 53, 56 (5th Cir. 1990); *Batchelor v. Intern. Broth. of Elect. Wkrs. Local 861*, 877 F.2d 441, 444 (5th Cir. 1989); *Lowry v. Bankers Life and Cas. Retirement Plan*, 865 F.2d 692, 694 (5th Cir. 1989); *Denton v. First Nat. Bank of Waco, Texas*, 765 F.2d 1295, 1304 (5th Cir. 1985); *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982).

The first inquiry is whether the retirement board's interpretation was legally correct. In answering the first question of whether the plan was correctly interpreted, a court must consider (1) whether the administrator has given the plan a uniform construction; (2) whether the interpretation is consistent with a fair reading of the plan; and (3) any unanticipated costs resulting from different interpretations of the plan. *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 637-38; *Batchelor v. Intern, Broth. of Elec. Wkrs. Local 861*, 877 F.2d 441, 444 (5th Cir. 1989). "Under this analysis, a district court's determination that an administrator's interpretation is plausible will not suffice.

Rather, the court must determine whether the administrator's interpretation was legally 'correct' or 'right'. . . . " *Goodman v. S & A Restaurant Corp.*, 821 F.Supp. 1139, 1145 (S.D.Miss. 1993).

The first factor in determining whether the defendants incorrectly interpreted the plan is whether there has been uniformity of construction There is no evidence that the defendants have ever addressed the issue of a disability arising from both non-football related disease and football injuries. If there is no evidence of uniformity, this factor is not used in the determination of whether the defendants correctly interpreted the plan. *Haubold v. Intermedics, Inc.*, 11 F.3d 1333, 1340 (5th Cir. 1994); *Batchelor v. Intern. Broth. of Elec. Wkrs. Local 861*, 877 F.2d 441, 444-45 (5th Cir. 1989). Similarly, there is no evidence of unanticipated costs using Webster's interpretation. The focus of the district and Fifth Circuit opinions was the second factor of whether the interpretation was consistent with a fair reading of the plan.

If it is determined the board's interpretation was not correct, then it must be determined if the board abused its discretion. When an incorrect interpretation is in direct conflict with the express language of the plan, there is a very strong indication of arbitrary and capricious behavior. *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 638 (5th Cir. 1992); *Batchelor v. Intern. Broth. of Elec. Wkrs. Local 861*, 877 F.2d 441, 448 (5th Cir. 1989); *Lowry v. Bankers Life & Cas. Retirement Plan*, 865 F.2d 692, 694 (5th Cir. 1989); *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982); *Kennedy v. Electricians Pension Plan*, 755 F.Supp. 700, 705 (M.D.La. 1991), *aff'd*, 954 F.2d 1116 (5th Cir. 1992). Where the interpretation of the trustees is in direct conflict with

the plain and express language of the plan, this alone is an abuse of discretion. *Kennedy v. Electricians Pension Plan*, 755 F.Supp. 700, 707-08 (M.D.La. 1991), *aff'd*, 954 F.2d 1116 (5th Cir. 1992); *Batchelor v. Intern. Broth. of Elec. Wkrs. Local 861*, 877 F.2d 441, 446 (5th Cir. 1989).

I. The Fifth Circuit Erred in Allowing the Retirement Board to Deny Benefits by Adopting An Interpretation Which Directly Conflicted With the Goals of the Retirement Plan

The retirement plan states in Section 5.1 that "The monthly pension will be no less than $4,000 if the disability results from a football injury incurred while an Active Player." Exhibit 7 at 27. The Fifth Circuit affirmed the board's interpretation that football benefits are paid only if the total disability would not exist but for the presence of football related injuries. This goes against the clear purpose and intent of the retirement plan. Under this interpretation, if a player suffers a totally disabling injury due to football, but also contracts an independent illness which by itself is totally disabling, the retirement plan may deny the substantially higher football related disability benefits even though the player suffered injuries which themselves rise to the level of a total disability due to football. If a player such as Webster is unfortunate to suffer from more than one illness or injury which would by itself render him totally disabling, and one disability entitles him to low payments under the plan while the other entitles him to substantially higher payments under the plan, the retirement board may elect to pay the lowest level available, even though he suffers from the pain and discomfort of the football related disability in addition to

that caused by the non-football disability. In other words, the more you suffer, the less you get.

Courts have generally looked at the plain language of the plan, and if the defendants' interpretation goes against the plan's straightforward language, courts have found the interpretation unreasonable. *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1520 (5th Cir. 1994); *Batchelor v. Intern. Broth. of Elec. Wkrs. Local 861*, 877 F.2d 441, 445 (5th Cir. 1989).

The retirement plan states a football related disability is worth substantially more than a non-football disability. There is a reason and a purpose for making a football-related disability worth more than non-football. The retirement plan should be interpreted in such a manner as to accomplish the plan's goals. The Eighth Circuit has surmised that the "Plan's goal is to take care of the players as part of their compensation for investing themselves in the sport." *Brumm v. Bert Bell NFL Retirement Plan*, 995 F.2d 1433, 1439 (8th Cir. 1993). The *Brumm* court determined that the defendants' interpretation of a football injury being that only of a single injury, and not of one caused by a series of lesser injuries, was an incorrect interpretation. The court stated that "The considerable difference between the dollar value of benefits paid to Level 1 recipients ($4,000/month) and Level 2 recipients ($750/month) also undermines the district court's support of the Board's scheme." *Id.* The court then stated:

> [T]he Board's construction of the benefits scheme seems inconsistent with Plan goals to the extent that we assume the Plan sought to meet the . . . reasonable expectations of those reading a plan whose benefits scheme appears

simply to differentiate between football and non-football disability. *Id.*

As the Eighth Circuit found, the retirement plan's scheme simply differentiates between football and non-football disability. *Id.* The retirement board disregarded this scheme in denying Webster benefits. A retirement board should not be allowed to disregard the plan's language, intent and goals in interpreting a retirement plan. The higher benefits for a football related injury reflects the retirement plan's goal to compensate a player for investing himself in the sport. Otherwise, there would be no difference in the amount paid for a football related and non-football related disability. The Fifth Circuit allowed the retirement board to deny benefits by adopting an interpretation inconsistent with the intent, language and goal of the retirement plan.

II. The Fifth Circuit Erred in Finding That a Person's Disability May Not Be Reclassified as Long as the Disabling Effects of the Initial Disability Remain, Even if the Effects Fall Below the Level of a Total Disability

The Fifth Circuit held that the board did not abuse its discretion in refusing football benefits because while the physician's reports reveal the effects of the football injuries were enough to leave him totally disabled, the disabling effect of his non-football related injuries persisted. The issue is not whether there was evidence of disability due to cancer in Webster's records, but whether there was substantial evidence that Webster was **totally disabled** due to cancer under the retirement plan's definition of

total disability. The retirement plan has a specific definition of permanent and total disability. Because of this, and arguably in an effort to achieve a level playing field, this definition is incorporated into the question of whether the player is totally disabled in the NFL's physician's report form. Docs. 38, 73, 108, 128, 151 at question 9. In this way, the physician will have the NFL's definition in mind when asked to answer the question of whether a player is totally disabled. This allows the retirement board to objectively determine whether a player is totally disabled simply by reading the physician's report, and without making their own subjective determinations. Because of this, it is these physician's reports which are the key to determining whether a player is entitled to benefits. Every physician's report after 1991 found Webster was disabled *solely* due to *football related activity*. Docs. 128, 135, 151. The physician's report asks the physician whether the illness or injury is a result of football related activity. There are spaces where the physician may check "yes", "no" or "cannot be determined" when asked this question. Docs. 128, 135, 151. After 1991, *every* physician the retirement board selected to examine Webster *only* answered "yes" to this question. Docs. 128, 135, 151. Therefore, every physician found that the nature of Webster's total disability could be determined, and that it was due to football, not cancer. Docs. 128, 135, 151. This evidence is undisputable. While Webster may have been suffering from the effects of his cancer for which he had been treated, the only physical problem rising to the level of a total disability under the retirement plan's definition were his football injuries. The district court and the Fifth Circuit found the retirement

board did not abuse its discretion in denying Webster football related benefits as there was evidence of cancer in these physician's reports. Under the district court and Fifth Circuit's rulings, it appears the only way Webster could receive football related benefits is if there were a finding of 100% remission from cancer. This interpretation unreasonably cuts off benefits due a person such as Webster whose initial injury drops below the level of a total disability, but does not completely disappear, and who subsequently becomes totally disabled due to a different disability.

CONCLUSION

Because the Fifth Circuit found that if a person has more than one illness or injury resulting in a total disability the retirement board may elect to pay the lesser of the two benefits under the plan, and because the Fifth Circuit held that a person should be reclassified to a higher benefit disability as long as any effects of the initially totally disabling illness persist, even if they fall below the level of a total disability, Webster's petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-21130

GEORGE WEBSTER,

Plaintiff-Appellant,

versus

BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN; WILLIAM BIDWILL; THOMAS CONDON; GENE UPSHAW; TAYLOR SMITH; LEONARD TEEUWS; JEFF VAN NOTE; EDDIE JONES; JAMES KENSIL; DANIEL JIGGETTS; EDWARD GARVEY; SARAH E. GUANT, formerly known as Sarah E. Meizlik,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
(H-95-CV-3826)

(Filed Sept. 22, 1997)

Before WISDOM, JOLLY, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

George Webster appeals the district court's order dismissing on summary judgment his claim that the Retirement Board arbitrarily and capriciously denied him past and future retirement and disability benefits under the Bert Bell NFL Player Retirement Plan (the "Plan"). Finding no abuse of discretion, the district court affirmed the Retirement Board's determination that Webster was totally disabled as a result of nonfootball related injuries and that, under the Plan, participants are entitled to "football" benefits only when the cause of total disability is such that, if the football related injury did not exist, the participant would not be totally disabled. We review *de novo* the district court's holding whether the Retirement Board abused its discretion, but will set aside factual findings underlying the district court's review of the Board's determination only if clearly erroneous. *See Sweatman v. Commercial Union Ins. Co.*, 39 F.3d 594, 601 (5th Cir. 1994).

As the district court's well-reasoned opinion properly concludes, the Retirement Board did not abuse its discretion in denying Webster football benefits. Webster's medical records contain ample evidence that he first became totally disabled as a result of throat cancer, as well as other nonfootball related injuries, and that they continued to plague him throughout the time he sought football benefits under the Plan. Despite Webster's assertions to the contrary, the medical reports issued in 1992 and 1993 do not establish that he was totally disabled *solely* as a result of football related injuries. Rather, the reports reveal that, while the effects of Webster's football

related injuries were enough to leave him totally disabled, the disabling effects of his nonfootball related injuries persisted. Thus, the Retirement Board did not abuse its discretion in finding that the initial and continuing cause of Webster's total disability was unrelated to football.

The district court also correctly determined that the Retirement Board's interpretation of the Plan did not constitute an abuse of discretion. Under the Plan, Webster was entitled to football benefits if his total disability "result[ed] from a football injury." The Board interpreted this provision to permit football benefits only if total disability would not exist but for the presence of football related injuries. This interpretation is entirely consistent with a fair and reasonable reading of the Plan and, therefore, not an abuse of discretion. *See Pickrom v. Belger Cartage Serv., Inc.*, 57 F.3d 468, 471 (5th Cir. 1995). As the district court concluded, because substantial evidence indicated that Webster's nonfootball related injuries were totally disabling, he was not entitled to football benefits under the board's reasonable interpretation of the Plan. Consequently, the judgment of the district court is, for the reasons assigned by that court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GEORGE WEBSTER, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-95-3826
BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, *et al.*, Defendants.	§	

MEMORANDUM AND OPINION

(Filed June 14, 1996)

Pending before this court are the following motions:

- defendants' motion to dismiss for failure to state a claim upon which relief can be granted (Docket Entry No. 10);
- defendants' motion for partial summary judgment (Docket Entry No. 15); and
- a cross-motion for summary judgment filed by plaintiff George Webster ("Webster") (Docket Entry No. 19).

Based on the pleadings, motions, submissions, and applicable law, this court GRANTS defendants' motion to dismiss, GRANTS defendants' motion for partial summary judgment, and DENIES plaintiff's cross-motion for summary judgment, for the reasons stated below.

I. Background

Plaintiff George Webster ("Webster") is a former professional football player. Webster alleges that he is eligible for "football-related" disability benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the defendant "Plan"). In 1991, the Plan awarded Webster total and permanent "nonfootball" disability benefits, retroactive to October 1, 1990.

The Plan provides for significantly higher "football-related" disability benefits than "nonfootball" benefits. On June 7, 1995, Webster filed this lawsuit, asserting that he should receive the higher level of benefits for "football-related" disability. He alleges causes of action under ERISA, 29 U.S.C. §§ 1104, 1105, and 1132(a)(B), and for breach of fiduciary duty, intentional infliction of emotional distress, and breach of contract. Defendants are the Plan, its director, and its past and present trustees.

A. The Bert Bell/Pete Rozelle NFL Player Retirement Plan

The parties agree that the Plan is an employee benefit plan covered by ERISA. The Plan provides disability benefits to eligible former professional football players. A participant who seeks disability benefits must file an application with the Retirement Board of the Plan. The Retirement Board has six voting members. Three of the six members are appointed by the National Football League Players Association, the union representing professional football players. The other three are members appointed by the National Football League Management Council.

The Plan that became effective in 1986 (the "1986 Plan") provides that the minimum monthly pension for a disability resulting "from a football injury incurred while an Active Player" is $4,000. The 1986 Plan does not define the phrase "disability [resulting] from a football injury." The minimum level of benefits for disability not resulting from a football injury is lower than the level for football-related injuries. The parties refer to the two classes of total and permanent disability under the 1986 Plan as "football disability" and "nonfootball disability."

In 1993, the NFL Players Association and the NFL revised the 1986 Plan (the "1993 Plan"). The 1993 established a new classification scheme for total and permanent disability benefits to replace the previous "football" and "nonfootball" classification scheme. The new classification had four categories of disability: Active Football, Active Nonfootball, Football Degenerative, and Inactive. (Docket Entry No. 16, Ex. 1, § 5.1).

Three of the four new categories in the 1993 Plan are relevant here. The Active Football disability category covers any player whose disability "results from League football activities, arises while the Player is an Active Player, and causes the Player to be totally and permanently disabled 'shortly after' the disability(ies) first arises." (*Id.* at § 5.1(a)). "Shortly after" is defined to mean a disability which becomes "total and permanent" not later than twelve months after the disability first arises. (*Id.*).

The Football Degenerative disability category covers any player whose "disability(ies) arises out of League football activities, and results in total and permanent

disability before the later of (1) age 45, or (2) 12 years after the end of the Player's last Credited Season." (*Id.* at § 5.1(c)).

The Inactive disability category covers any player whose disability "arises from other than League football activities" after the end of the player's professional football career and any player whose "disability(ies) arises out of League football activities," but "results in total and permanent disability after the later of (i) age 45, or (ii) 12 years after the end of the Player's last Credited Season." (*Id.* at § 5.1(d)(2)).

Both the 1986 Plan and the 1993 Plan permit the Retirement Board to request any person receiving disability benefits to submit to physical examinations once every six months for the purpose of reexamining the beneficiary's physical condition and continuing entitlement to disability benefits.

B. Webster's Medical History

Webster was born in 1945. He played professional football from 1967-76. Webster injured his knees several times during his playing career and had at least three knee operations between 1969 and 1974 because of football-related injuries.

Webster applied to the Plan for total and permanent disability benefits in February 1989. Dr. James Butler ("Dr. Butler") examined Webster. Dr. Butler found that "around 1975," Webster's football-related injuries caused arthritis in Webster's knees, right foot and ankle, right

hand, lower back, and both shoulders. However, Dr. Butler concluded that Webster was not totally and permanently disabled to the extent that he was prevented from or unable to engage in any occupation for any remuneration or profit. Dr. Butler found that Webster was able to engage in gainful employment, but "nothing rigorous or heavy . . . no climbing or being on feet for long periods of time."

On June 8, 1989, the Retirement Board denied Webster's application for disability benefits. Webster appealed the Retirement Board's decision. On September 21, 1989, the Retirement Board denied Webster's appeal.

On August 29, 1989, Webster was in an automobile accident in which an 18-wheel truck collided with his car. Following the accident, Webster suffered persistent neck, back, and shoulder pain, headaches, vertigo, hoarseness, and laryngitis.

In October 1990, Webster was diagnosed with cancer of the left vocal cord. His treating physician was Dr. Nathan Cotlar ("Dr. Cotlar"), an oncologist. In January, April, and May 1991, Webster was hospitalized due to cardiovascular problems and complications related to his cancer and its treatment.

Webster submitted a new claim for total and permanent disability benefits to the Plan on April 19, 1991. In that application, Webster stated that throat cancer was the cause of his disability.

Dr. Cotlar examined Webster in connection with the 1991 application, and concluded that due "to terminal (carcinoma,) illness, [Webster] is unemployable, at any

duties or employment." Dr. Cotlar also stated that Webster's disability was not the result of a football-related injury. (Docket Entry No. 16, Ex. 108). Another physician familiar with Webster's medical history, Dr. P. O. Jones, submitted a medical evaluation to the Plan dated May 20, 1991, stating that Webster "is not capable of performing any type of work, including sedentary work, because of pain, drowsiness and lack of any energy resulting from medication to control pain, periodic hospitalization, chemotherapy and radiotherapy scheduling."

On June 13, 1991, the Retirement Board approved Webster's 1991 application for nonfootball disability benefits, retroactive to October 1, 1990. The Retirement Board concluded that the medical evidence demonstrated that Webster had been totally and permanently disabled since the onset of his throat cancer in October 1990. Based on the Retirement Board's determination that his disability was not football related, the Retirement Board approved monthly disability benefits for Webster in the amount of $1,060. Webster did not seek further review of the Board's award of nonfootball disability benefits.

By letter dated April 6, 1992, the Plan requested that Webster and his treating physician, Dr. Cotlar, provide a report on Webster's present medical condition. Dr. Cotlar stated that Webster continued to be totally and permanently disabled; that his disability was football related; and that Webster was "also being treated for his cancer of his throat, with daily medications prescribed . . . for enlarged heart, for which he was hospitalized and treated for clot in (vein) valve."

By letter dated April 8, 1993, the Plan again requested that Webster and Dr. Cotlar provide a report on Webster's medical condition. In a report dated May 3, 1993, Dr. Cotlar concluded that Webster remained totally and permanently disabled. Dr. Cotlar stated that Webster was disabled both from injuries suffered during his football career and from terminal cancer of the left vocal cord. (Docket Entry No. 16, Ex. 135).

By letter dated October 8, 1993, Webster's attorney requested that the Plan change Webster's disability classification from "nonfootball" to "football." On January 6, 1994, the Retirement Board denied the reclassification request, stating that Webster's disability was not football related, but rather caused by his throat cancer. By letter dated April 8, 1994, Webster appealed the Plan's denial of his reclassification request.

By letter dated April 19, 1994, the Plan requested that Webster and Dr. Cotlar provide another report on Webster's medical condition. In response, Dr. Jones submitted a physician's report which stated that Webster remained totally and permanently disabled and that Webster's disability was the result of both illness and injury resulting from football-related activity. Dr. Jones listed numerous causes of Webster's disability, including (1) cancer of the left vocal cord, (2) degenerative cervical disc disease, (3) degenerative arthritis, (4) congestive heart failure, (5) tumor, (6) bronchitis, and (7) pulmonary emboli.

On October 4, 1994, the Retirement Board denied Webster's appeal from the denial of his request for football – related disability benefits. In a letter dated October 20, 1994, the Board stated as follows:

> The Retirement Board previously determined, from the medical evidence submitted to the Plan, that Mr. Webster's disablements resulted in total and permanent disability effective October 1, 1990, when his throat cancer had been diagnosed. None of the medical or other evidence submitted to the Retirement Board indicated that Mr. Webster's disability was total and permanent under the terms of the Plan before his cancer diagnosis.
>
> Because throat cancer is the condition that made Mr. Webster totally and permanently disabled, his total and permanent disability is not the result of a disability(ies) that arose out of League football activities . . .

The parties have filed cross motions for summary judgment as to whether the Plan's denial of Webster's application for football-related disability benefits was an abuse of discretion. Defendants also seek dismissal of Webster's remaining claims pursuant to FED. R. CIV. P. 12(b)(6).

II. The Relevant Legal Standards

A. The Legal Standard for a Motion to Dismiss

Under Rule 12(b)(6), "a claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Piotrowski v. City of Houston*, 51 F.3d 512, 514 (5th Cir. 1995). In a motion to dismiss, the allegations of the complaint must be accepted as true, *Cruz v. Beto*, 405 U.S. 319,

322 (1972), and the complaint construed favorably to the pleader, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A complaint need not outline all the elements of a claim, but it must be possible to draw an inference that these elements exist. *Walker v. South Cent. Bell Tel. Co.*, 904 F.2d 275, 277 (5th Cir. 1990).

B. The Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. Under FED. R. CIV. P. 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue for trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986); *Norman v. Apache Corp.*, 19 F.3d 1017, 1023 (5th Cir. 1994). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response. *Little*, 37 F.3d at 1075.

When the moving party has met its Rule 56(c) burden, the nonmovant cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995). The nonmovant must go beyond the pleadings and designate specific

facts showing that there is a genuine issue for trial. *Little*, 37 F.3d at 1075 (citing *Celotex*, 106 S. Ct. at 2553-54).

In deciding a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2513. "Rule 56 *mandates* the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Little*, 37 F.3d at 1075 (citing *Celotex*, 106 S. Ct. at 2552).

III. The Motion to Dismiss

Defendants move the court to dismiss Webster's claims against the individual defendants and for breach of fiduciary duty, intentional infliction of emotional distress, breach of contract, and punitive damages for failure to state a claim upon which relief can be granted.

Webster first argues that defendants' motion to dismiss was not timely because it was filed after defendants answered Webster's complaint. (Docket Entry No. 14). FED. R. CIV. P. 12(b) provides in part that a Rule 12(b)(6) motion to dismiss for failure to state a claim, and other Rule 12(b) motions, "shall be made before pleading if a further pleading is permitted." However, certain motions can be raised after a responsive pleading has been filed. The timing provision has been explained as follows:

> A strict interpretation of the timing provision's language leads to the conclusion that the court

> must deny any motion made after a responsive pleading as being too late. . . . [U]nder Rule 12(h) the defenses of lack of subject matter jurisdiction, Rule 12(b)(1), failure to state a claim upon which relief can be granted, Rule 12(b)(6), and failure to join a party under Rule 19, Rule 12(b)(7), are preserved from the waiver mechanism in Rule 12(h). Thus, motions raising any of these matters may be considered by the court even when interposed after the responsive pleading has been filed, although technically they no longer are Rule 12(b) motions.

5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1361 (1990 & Supp. 1996); *see also Jones v. Clinton*, 858 F. Supp. 902, 906 (E.D. Ark 1994); *Sharma v. Skaarup Ship Management Co.*, 699 F. Supp. 440, 444 (S.D.N.Y. 1988), *aff'd*, 916 F.2d 820 (2nd Cir. 1990), *cert. denied*, 490 U.S. 907 (1991).

This court may consider defendants' motion to dismiss.

A. Breach of Fiduciary Duty

ERISA requires a fiduciary, such as a plan administrator to:

> discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and a like character and with like aims . . .

. . . .

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

29 U.S.C. § 1104.

ERISA also provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . shall be personally liable to make good to such plan any losses to the plan resulting from such breach. . . . " 29 U.S.C. § 1109(a).

Under 29 U.S.C. § 1105, a fiduciary is also liable for:

a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his

> status as a fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1132(a)(2) provides that a "civil action may be brought . . . by a [plan] participant, beneficiary or fiduciary for appropriate relief [for breach of fiduciary duty] under section 1109 of this title."

Defendants argue that sections 1104, 1105, 1109, and 1132 are designed to remedy breaches of fiduciary duty which damage a plan as an entity, or a plan's participants and beneficiaries as a group, but that Webster may not recover individual damages for himself under these sections.

To establish a claim of breach of fiduciary duty, an ERISA plaintiff must prove a breach of a fiduciary duty and a *prima facie* case of loss to the plan. *McDonald v. Provident Indemnity Life Ins. Co.*, 60 F.3d 234, 236 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1267 (1996), *citing Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994). "Once the plaintiff has satisfied these burdens, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty." *Id.* A fiduciary's duty "runs to the plan as a whole," not to any individual beneficiary or participant. *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1523 (5th Cir. 1994), *quoting Williams v. Caterpillar, Inc.*, 944 F.2d 658, 665 (9th Cir. 1991).

Recovery for breach of fiduciary duty under ERISA "is limited to relief protecting the integrity of the plan as a whole and does not extend to individual plan participants." *Williams*, 944 F.2d at 665, *quoted in Farr v. US West, Inc.*, 58 F.3d 1361, 1364 (9th Cir. 1995); *see also Massachusetts Mutual Life Ins. Co. v. Russell*, 105 S. Ct. 3085 (1985) (holding that section 1109 only allows recovery that "inures to the benefit of the plan as a whole"); *Total Plan Serv. Inc. v. Texas Retailers Ass'n*, 932 F.2d 357, 358 (5th Cir. 1991) (per curiam). This limitation on claims for breach of fiduciary duty reflects ERISA's primary concern with the possible misuse or mismanagement of plan assets. *McDonald*, 60 F.3d at 237.

Webster's complaint does not state that he is seeking to recover damages on behalf of the Plan or the Plan's participants and beneficiaries as a group. Webster does not plead that the Plan, its participants, or its beneficiaries as a group have suffered a loss. Because Webster seeks only to recover damages on behalf of himself and does not claim that the Plan as a whole has been harmed, Webster's complaint fails to state a claim for breach of fiduciary duty under ERISA. *McDonald*, 60 F.3d at 236; *Williams*, 944 F.2d at 665.

Webster's only claim against the individual defendants is for breach of fiduciary duty. (Docket Entry No. 14, pp. 8-10). Because Webster's complaint fails to state a claim upon which relief can be granted for breach of

fiduciary duty, the individual defendants are DISMISSED.[1]

B. Webster's Claims for Intentional Infliction of Emotional Distress, Breach of Contract, and Punitive Damages

Defendants argue that Webster's claims for intentional infliction of emotional distress and breach of contract are preempted by ERISA. ERISA's broad preemption clause states that ERISA "shall supersede any and all State laws insofar as they may . . . relate to any employee benefit plan. . . . " 29 U.S.C. § 1144(a). A "law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

The courts have held that ERISA preempts state law claims for breach of contract and intentional infliction of emotional distress based on a failure to pay benefits due under an ERISA plan. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 (1987); *Hogan v. Kraft Foods*, 969 F.2d 142, 144-45 (5th Cir. 1992); *Brock v. Primedica, Inc.*, 904 F.2d 295, 297 (5th Cir. 1990); *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1290 (5th Cir. 1988).

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[1] Defendants also argue that the Plan director and certain former Plan trustees are not proper defendants because they are not Plan fiduciaries. (Docket Entry No. 11, p. 8, n. 3). The court does not reach this issue.

ERISA preempts Webster's state law claims for intentional infliction of emotional distress and breach of contract. *Pilot Life Ins. Co.*, 481 U.S. at 48; *Hogan*, 969 F.2d at 144-45.

It is well settled that ERISA does not allow a plan participant or beneficiary to recover punitive damages under state law. *Medina v. Anthem Life Ins. Co.*, 983 F.2d 29, 31 (5th Cir.), *cert. denied*, 114 S. Ct. 66 (1993); *Dotson v. United States*, 876 F. Supp. 911, 914 (S.D. Tex. 1995). Webster's claims for punitive damages are DISMISSED.

IV. The Cross Motions for Summary Judgment

Defendants argue that Webster is not entitled to football disability benefits because Webster became disabled due to throat cancer in October 1990. Webster argues that, as of May 14, 1992, he had "both football and non-football disabilities" and should receive the higher level of benefits for football disabilities.

A. The Applicable Standard of Review Under ERISA

In *Firestone Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), the Supreme Court held that "a denial of benefits challenged under § 1132(a)(1)(B) [of ERISA] is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." If such discretionary authority is present, an abuse of discretion standard applies.

Other courts which have examined the Plan at issue here have concluded that it gives the Retirement Board discretionary authority. *See, e.g., Brumm v. Bert Bell NFL Retirement Plan*, 995 F.2d 1433, 1437 (8th Cir. 1993); *Bidwill v. Garvey*, 943 F.2d 498, 505 (4th Cir. 1991). The parties agree that the abuse of discretion standard applies. (Docket Entry No. 19, p. 4; No. 16, pp. 20-25).

The Fifth Circuit suggests a two-step process to analyze an administrator's decision under the abuse of discretion standard. First a court determines whether the administrator reached a "legally correct" interpretation of the plan, considering factors such as: (1) whether the administrator has given the plan a uniform construction; (2) whether the interpretation is consistent with a fair reading of the plan; and (3) whether any unanticipated costs will result from different interpretations of the plan. *Chevron*, 47 F.3d at 145; *Wildbur*, 974 F.2d at 637; *Jordan v. Cameron Iron Works, Inc.*, 900 F.2d 53, 56 (5th Cir. 1995), *cert. denied*, 498 U.S. 939 (1990). If the administrator has not given the plan the legally correct interpretation, a court then determines whether the administrator's interpretation was an abuse of discretion. *Chevron*, 47 F.3d at 145; *see also Jordan*, 900 F.2d at 56; *Denton v. First Nat'l Bank*, 765 F.2d 1295, 1304 (5th Cir. 1985). The reviewing court is not rigidly confined to the two-step analysis in every case. *Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1307 n.3 (5th Cir. 1994).

B. The Applicability of the 1986 Plan

Defendants argue that the four new categories of disability set out in the 1993 Plan govern Webster's October 8, 1993 application for football-related disability benefits. Webster argues that the 1986 Plan, setting out the two categories of football and nonfootball disabilities, govern his application.

Section 5.5 of the 1993 Plan provides as follows:

> **Special Rules.** Notwithstanding the above provisions of this Article 5 [creating the four new categories of disability], *if a previous application for a total and permanent disability benefit by a Player was denied prior to May 6, 1993 under [the 1986 Plan]*, such Player will be subject to the following special rules:
>
> . . . .
>
> The monthly pension will be no less than $4,000 if the disability results from a football injury incurred while an Active Player.

(Docket Entry No. 16, Ex. 1) (emphasis added).

Defendants argue that:

> The Special Rules of Section 5.5 in effect incorporate the old dual "football/nonfootball" disability scheme of the [1986 Plan] for players covered by the Special Rules. The Special Rules cover players applying for disability benefits after May 6, 1993 who had an earlier related application denied before May 6, 1993.

Docket Entry No. 21, p. 9).

Section 5.5 of the 1993 Plan does not state that the Special Rules and the 1986 Plan apply only if the earlier

application for disability benefits is "related" to the application made after May 6, 1993.

Defendants also argue that section 5.5 should be read in light of the 1993-2000 NFL Collective Bargaining Agreement (the "Agreement") because the 1993 Plan was designed to implement the terms of the Agreement. The Agreement provides in relevant part as follows:

> [The four new categories in the 1993 Plan] will also apply to (1) persons currently receiving total and permanent disability benefits under the [1986 Plan] regardless of whether the player had a Credited Season after 1992 or when the disability(ies) arose, *unless a previous application for benefits by such player that is related to the present disability(ies) was denied prior to the date of this Agreement.*

(Docket Entry No. 16, Ex. 10, p. 137) (emphasis added). Defendants argue that section 5.5 and the Agreement provide that:

> a former player who had been denied disability benefits under the [1986] Plan would upon re-application after May 6, 1993, have his present disability claim considered under the disability standards and benefit structure of the old Plan if his present disability claim was *related* to his prior disability claim. The evident purpose of this limited exception to retroactive application of the new disability scheme of the 1993 Plan is to avoid revisiting and reconsidering under the new Plan disability benefit claims that had been denied under the old Plan.

(Docket Entry No. 23, pp. 8-9).

In 1989, Webster applied for, and was denied, football disability benefits. Webster's October 1993 application for football disability benefits was based on the same football injuries. The 1993 application was "related to" the 1989 application. Under defendants' interpretation of the Special Rules, Webster's application must be considered under the 1986 Plan.[2]

C. Interpretation of the 1986 Plan

In its October 1994 letter, the Retirement Board stated the grounds for its denial of Webster's appeal for football disability benefits, as follows:

> The Retirement Board previously determined, from the medical evidence submitted to the Plan, that Mr. Webster's disablements resulted in total and permanent disability effective October 1, 1990, when his throat cancer had been diagnosed. None of the medical or other evidence submitted to the Retirement Board indicated that Mr. Webster's disability was total and permanent under the terms of the Plan before his cancer diagnosis.
>
> Because throat cancer is the condition that made Mr. Webster totally and permanently disabled,

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[2] If his application were considered under the 1993 Plan, Webster would receive "Inactive" disability benefits because his League football activities did not result in total and permanent disability until after Webster was 45 years old and more than 12 years after the end of his last Credited Season. (1993 Plan, Docket Entry No. 16, Ex.1, § 5.1(d)(2)). The Inactive disability benefits that Webster would receive under the 1993 Plan are equal to the nonfootball disability benefits he would receive under the 1986 Plan.

> his total and permanent disability is not the result of a disability(ies) that arose out of League football activities . . . [3]

(Docket Entry No. 16, Exhibit 11, Document 161).

Webster alleges that by May 14, 1992, his football injuries had deteriorated to the point that he was disabled because of those football injuries, in addition to and independently of his nonfootball-related injuries and illness. Webster argues that defendants incorrectly interpret the Plan to provide football disability benefits only if the initial cause of disability was football related. Webster contends that under the 1986 Plan, if he is disabled for two or more reasons and one of those reasons is football related, he is entitled to football disability benefits.

Under *Chevron*, this court must first determine whether the Retirement Board reached a "legally correct" interpretation of the Plan, considering factors such as: (1) whether the administrator has given the Plan a uniform construction; (2) whether the interpretation is consistent with a fair reading of the Plan; and (3) whether any unanticipated costs will result from different interpretations of the Plan. 47 F.3d at 145. The record contains no evidence that the Plan has had another occasion to consider whether a player in a situation similar to Webster's may receive football disability benefits. There is no evidence that the administrator has not given the Plan a

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[3] The Retirement Board applied the 1993 Plan to Webster's appeal. This court finds that under either Plan, the retirement Board's denial of Webster's application for a higher level of benefits is valid.

uniform construction or that approval of Webster's application would result in significant unanticipated costs to the Plan.

The issue is whether a Plan participant, initially disabled by nonfootball injuries or illness, may later claim football disability benefits if football-related injuries subsequently worsen so that they would result in disability even if the initial, separate, and continuing disabling condition were not present.

The 1986 Plan states that a Plan participant is entitled to football disability benefits if "the disability results from a football injury incurred while an Active Player." The phrase "if the disability results from a football injury" supports the Board's interpretation that the cause of the disability must be a football injury, so that if the football-related injury were not present, the participant would not otherwise be disabled. The Board's interpretation is consistent with a fair reading of the Plan.

Even if the Retirement Board's interpretation of the Plan were not legally correct, this court finds that the interpretation is not an abuse of discretion. The Retirement Board interpreted the 1986 Plan to require that if there are two or more underlying conditions causing disability, one football related and the others not football related, the disability will be treated as "nonfootball" if: 1) the nonfootball-related condition was the initial cause of disability; 2) the nonfootball-related disability continued; and 3) the participant would be totally disabled from the nonfootball-related injury or disease, even if the subsequent football-related condition were not present.

Webster's medical record contains ample evidence that Webster first became totally and permanently

disabled in October 1990 due to throat cancer and other nonfootball-related injuries and illness. Those injuries and illness continued. His condition never improved to the point that he was no longer disabled from throat cancer and other nonfootball-related injuries or illness. The disabling effects of his football-related injuries arose after Webster was already disabled from cancer and nonfootball injuries. Webster was continuously disabled from nonfootball-related illness and injury. If the football-related injuries were not present, Webster would still be totally disabled from cancer and other nonfootball injuries and illness. The Retirement Board did not abuse its discretion in finding that Webster's initial and continuing cause of disability was not related to football and that Webster was not entitled to football disability benefits under the Plan.

V. Conclusion

This court GRANTS defendants' motion to dismiss, GRANTS defendants' motion for partial summary judgment, and DENIES Webster's cross-motion for summary judgment.

The parties are to present a proposed final judgment consistent with this Memorandum and Opinion within ten days from the date it is entered.

SIGNED on June 12, 1996, at Houston, Texas.

/s/ Lee H Rosenthal
Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-21130

GEORGE WEBSTER,

Plaintiff-Appellant

v.

BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN; WILLIAM BIDWILL; THOMAS CONDON; GENE UPSHAW; TAYLOR SMITH; LEONARD TEEUWS; JEFF VAN NOTE; EDDIE JONES; JAMES KENSIL; DANIEL JIGGETTS; EDWARD GARVEY; SARAH E. GUANT, formerly known as Sarah E. Meizlik,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

(Filed Oct. 23, 1997)

ON PETITION FOR REHEARING

Before WISDOM, JOLLY, and EMILIO M GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by appellant's [sic] in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

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